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# Protecting Surface Land by Internalizing the Cost of Oil and Gas Development: Wyoming's Surface Owner Accommodation Act Strikes a More Sustainable Balance

by JENNIFER A. C. RICHARDSON\*

## Introduction

Technical advancements in drilling that allow access to previously unconventional mining areas, plus recent federal drilling efforts to develop more domestic oil and gas have led to predictions that the total number of wells in Wyoming will double within the next ten years.<sup>1</sup> While mineral development accelerates, the value of surface land for open space, clean air, and remote locations is also increasing as Wyoming's population expands.<sup>2</sup> Considering that almost half of all privately owned land in Wyoming is located on top of federal minerals,<sup>3</sup> the stage is set for amplified conflicts over the regulation of surface damage cause by mineral development. These disputes can be heated and Wyoming has a history of such conflicts. In one case, a surface owner barred entry by the federal mineral lessee until the developer agreed to pay annual damages, which he refused to do.<sup>4</sup> When the lessee entered anyway with heavy drilling

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1. *Oil and Gas Drilling on Split Estate Lands*, LANDOWNERS ASS'N OF WYO., <http://www.wyominglandowners.org/splitstates/index.php> (last visited April 10, 2010) [hereinafter LANDOWNERS ASS'N].

2. *Id.*; see also Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1, 8 (2004).

3. LANDOWNERS ASS'N, *supra* note 1.

4. *Reno Livestock Corp. v. Sun Oil Co.*, 638 P.2d 147, 149-50 (Wyo. 1981).

equipment in tow, the surface owner warned that if any of the equipment moved off the road, he would shoot out every tire.<sup>5</sup>

Beyond the legal rights that attach to property ownership, the actual effects of oil and gas development on surface land are significant. Once development begins, it decreases the surface owner's quality of life by creating noise, dust, and traffic.<sup>6</sup> Loss of privacy is another big issue, as it is not just oil and gas personnel that monitor the site—development includes consultation with archaeologists, wildlife biologists, and plant specialists.<sup>7</sup> The footprint of development is not limited to the drilling plot either. Wastewater discharges affect downstream areas, damaging both soil and vegetation<sup>8</sup> and mining impacts the surface environment through increased erosion, water quality issues, spread of noxious weeds, and disturbance to wildlife habitats.<sup>9</sup> The effects of mineral development can also cause surface owners to abandon future plans for the surface such as using the property for hunting or as a rustic retreat.<sup>10</sup> Additionally, so long as the mineral developer is not negligent, excessive, or unreasonable in his use of the surface, he does not have a duty to restore the land to its original condition.<sup>11</sup> A Bureau of Land Management ("BLM") Report summarized the situation best: as the federal law currently stands, surface owners "bear the brunt of the development, have their lives and land changed forever, and receive little if any compensation."<sup>12</sup>

At the state level, some legislatures have reexamined whether the cost of surface damage is best borne by the surface owner, or instead by the developers and consumers of the minerals.<sup>13</sup> The

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5. *Id.* at 150.

6. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, ENERGY POLICY ACT OF 2005 - SECTION 1835 SPLIT ESTATE, FEDERAL OIL AND GAS LEASING AND DEVELOPMENT PRACTICES, A REPORT TO CONGRESS 10 (2006) [hereinafter BLM REPORT TO CONGRESS].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894, 897 (N.M. 1985); *see also Exxon Corp. v. Pluff*, 94 S.W. 3d 22, 30 (Tex. App. 2002) (holding that lessee had no express duty to restore the surface and that no such duty was implied).

12. BLM REPORT TO CONGRESS, *supra* note 6, at 9.

13. *See Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 n.4 (N.D. 1979); *see also Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 556 n.3 (8th Cir. 1984). Other states with Surface Damage Protection Acts include Colorado, Illinois, Indiana, Kentucky, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, and West Virginia.

Wyoming Legislature did just that with the 2005 Wyoming Surface Owner Accommodation Act (“WSOAA”), which provides surface owners with protections supplementary to those provided under federal law, such as requiring notice before entry and the commencement of operations, negotiation regarding the planning of oil and gas activities, and fair compensation for economic losses caused by development.<sup>14</sup> But, the applicability of this state law to federally leased minerals has yet to be officially determined as no suits challenging the WSOAA have been decided. When the WSOAA first passed, the Director of BLM asserted that it conflicts with federal law and thus cannot be applied to federal minerals.<sup>15</sup> In contrast, the Wyoming Oil and Gas Conservation Commission (“WOGCC”), Wyoming Governor Dave Freudenthal, and Wyoming’s Attorney General Pat Crank maintained that the WSOAA is indeed applicable to federal minerals in split estates.<sup>16</sup>

This paper explores the several ways in which the WSOAA protects surface owners and concludes that the Act does so without conflicting with federal laws or the ultimate objectives of federal mineral leasing—therefore, preemption is not authorized by the Supremacy Clause.

## I. Background

By 1900, split estates were well established on private land in the United States, with the surface owner and mineral owner each holding indefeasible title and all the “incidents of separate ownership.”<sup>17</sup> These split estates began with coal and hard rock mining, but soon reached oil and gas estates as well.<sup>18</sup> Between 1909 and 1916, Congress passed a series of laws requiring that all federal land patents granted to private citizens must reserve the mineral

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14. WYO. STAT. ANN. §§30-5-401 to -410 (2009).

15. Matt Micheli, *Showdown at the OK Corral – Wyoming’s Challenge to U.S. Supremacy on Federal Split Estate Lands*, 6 WYO. L. REV. 31, 34 (2006) (citing letter from Kathleen Clarke, Dir., United States Bureau of Land Management, to Don J. Likwartz, State Oil & Gas Supervisor, Wyo. Oil & Gas Conservation Comm’n (June 13, 2005) (on file with the Wyo. Oil & Gas Conservation Comm’n)).

16. Micheli, *supra* note 15, at 34.

17. *Smith v. Jones*, 60 P. 1104, 1106 (Utah 1900); *see also* Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 425 (1998).

18. Mergen, *supra* note 17, at 425.

rights to the United States.<sup>19</sup> The most important of these laws was the Stock-Raising Homestead Act of 1916 (“SRHA”),<sup>20</sup> under which the majority of Wyoming homesteads were granted.<sup>21</sup> Nationwide, over 32 million acres were patented under the SRHA before President Franklin D. Roosevelt issued an Executive Order in 1935 that withdrew all of the unappropriated and unreserved public lands in twelve Western states from settlement, location, or entry—effectively ending the homesteading era.<sup>22</sup>

The specifics of the SRHA are important because in managing split estates, BLM “must comply with the provisions of the Act under which the surface was patented.”<sup>23</sup> The SRHA opened tracts of 640 acres or less for settlement and reserved all minerals and the right to mine them to the United States.<sup>24</sup> Any person who thereafter acquires from the United States the right to mine and remove coal or other mineral deposits<sup>25</sup> is permitted to enter and occupy as much of the surface land as may be necessary for “all purposes reasonably incident” to the removal of the minerals.<sup>26</sup> In terms of compensation to the surface owner for this incursion, the mineral developer is required to pay for damages to “crops,” “improvements,”<sup>27</sup> and the “value of the land for grazing.”<sup>28</sup> Reimbursement for other damages is only required if it is caused by the excessive or negligent use of the surface.<sup>29</sup> So long as the use of the surface is limited to use reasonably

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19. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 51–52 (1992); *see also* Mergen, *supra* note 17, at 426.

20. 43 U.S.C. §§ 291–298, 300, 302 (repealed 1976); 43 U.S.C. §§ 299, 301 (2006).

21. LANDOWNERS ASS’N, *supra* note 1.

22. *Andrus v. Utah*, 446 U.S. 500, 514–15 (1980).

23. BLM REPORT TO CONGRESS, *supra* note 6, at 6.

24. 43 U.S.C. § 291 (repealed 1976).

25. “Other minerals” includes oil and gas. *Skeen v. Lynch*, 48 F.2d 1044 (10th Cir. 1931).

26. 43 U.S.C. § 299(a) (2006).

27. *Id.*

28. 30 U.S.C. § 54 (2006); 43 C.F.R. § 3814.1(b) (2009); *see* *Kinney-Coastal Oil Co. v. Kieffer*, 1 F.2d 795, 797 (D. Wyo. 1924) (*aff’d* *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928) (*superseded by statute as stated in* *Belle Fourche Pipeline Co. v. Wyoming*, 766 P.2d 537, 544 (Wyo. 1988))) (“‘crops’ clearly refers to agriculture, and the term ‘improvements,’ . . . can reasonably have no other significance than those of an agricultural nature”).

29. *Bell v. Cardinal Drilling Co.*, 85 N.W.2d 246, 250 (N.D. 1957); *see also* Mergen, *supra* note 17, at 433.

necessary to extract the leased minerals,<sup>30</sup> courts have historically placed few restrictions on mineral developers and have refrained from balancing any interests of the surface owner.<sup>31</sup>

But recent state initiated surface damage acts, as well as the evolution of the accommodation doctrine, “illustrate a trend [in] providing greater protection to the surface owner than common law recognizes.”<sup>32</sup> The 1971 Texas case of *Getty Oil v. Jones*<sup>33</sup> was the first to place limitations on the mineral estate’s use of the surface in holding that “the mineral estate owner’s right to use the surface [is] *not absolute*.”<sup>34</sup> The *Getty Oil* accommodation doctrine did not go so far as to become a balancing test, but it does require that mineral developers act prudently and “have due regard for the interests of the surface owner in exercising [the] right to use the surface to explore for and extract minerals.”<sup>35</sup> If the surface owner seeks accommodation of his uses, the burden is on him to demonstrate that the “developer’s surface use is unreasonable and that reasonable alternatives exist.”<sup>36</sup> The rationale behind this doctrine is that when alternative access is reasonable, it should be used because “each [owner] should have the right to the use and enjoyment of his interest in the property to the highest degree possible not inconsistent with the rights of the other.”<sup>37</sup>

30. *Belle Fourche*, 766 P.2d at 544 (citing Harry A. Thompson, *Surface Damages – Claims by Surface Estate Owner Against Mineral Estate Owner*, 14 WYO. L. J. 99 (1959–60)).

31. Christopher M. Alspach, *Surface Use by the Mineral Owner: How Much Accommodation is Required Under Current Oil and Gas Law?*, 55 OKLA. L. REV. 89, 91 (2002).

32. See generally, JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1987); see also Mergen, *supra* note 17, at 433 (citing John F. Welborn, *New Rights of Surface Owners: Changes in the Dominant/Servient Relationship Between the Mineral and Surface Estates*, 40 ROCKY MTN. MIN. L. INST. § 22.01, 22-14 (1994) (observing that there are increasingly legislative and political inroads on common law notions of mineral estate dominance)).

33. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 627–28 (Tex. 1971).

34. Alspach, *supra* note 31, at 92 (emphasis added).

35. Mergen, *supra* note 17, at 433.

36. *Getty Oil*, 470 S.W.2d at 627–28; see also Mergen, *supra* note 17, at 435.

37. *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976); see also Mergen, *supra* note 17, at 435–36.

## II. Preemption

The Supremacy Clause<sup>38</sup> invalidates state laws that interfere with or are contrary to federal laws.<sup>39</sup> The Property Clause grants the power to Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>40</sup> The Court has continually supported the view that Congress is entrusted this power over public lands “without limitations.”<sup>41</sup> But, the notion that this exempts federal lands from *all* state regulation is “totally unfounded.”<sup>42</sup> The Supreme Court made it clear in *Kleppe v. New Mexico* that states are free to enforce civil and criminal laws on federal land just “so long as they do not conflict with federal law.”<sup>43</sup> So state laws are permitted to have some power over federal land, but not to the extent that they “alter or change an interest in federal property”<sup>44</sup> or interfere with “the full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights to them.”<sup>45</sup>

There are three different routes to federal preemption of state laws: express, implied, and operational. Congress has the power to expressly preempt state law if it chooses to do so,<sup>46</sup> but it has not done so for mineral leasing via any of the governing statutes: the Mineral Leasing Act (“MLA”),<sup>47</sup> the Energy Policy Act of 2005 (“EPACT”),<sup>48</sup> the Federal Land Policy and Management Act (“FLPMA”),<sup>49</sup> or the

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38. U.S. CONST. art. VI, § 3, cl. 2.

39. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

40. U.S. CONST. art. IV, § 3, cl. 2.

41. *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *see also Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

42. *Kleppe*, 426 U.S. at 543.

43. *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *see also Kleppe*, 426 U.S. at 543.

44. *Micheli*, *supra* note 15, at 44.

45. *Id.* (quoting *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002)).

46. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

47. *Gulf Oil Corp. v. Wyo. Oil & Gas Conservation Comm’n*, 693 P.2d 227, 236 (Wyo. 1985) (finding that the MLA does not reflect “a pervasive regulatory scheme or an intent to abolish state influence over mining activities on federal property”); *see also Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 371 (W.D. Okla. 1967) (holding the MLA contains no prohibition against the exercise of state police power).

48. *Bd. of Cnty. Comm’rs v. BDS Int’l, LLC*, 159 P.3d 773, 784 (Colo. App. 2006).

49. *Id.*

SRHA.<sup>50</sup> Therefore, the WSOAA's state regulations on mineral leasing are not expressly preempted.

Implied preemption of an entire field occurs when the federal interest in the field is "so dominant that the federal system is assumed to preclude the enforcement of state laws on the same subject."<sup>51</sup> Courts have repeatedly held that the MLA is not meant to assert exclusive control over federally leased mineral lands.<sup>52</sup> Rather, Congress has always allowed local governments to play a significant role in regulating the impacts of federal mineral development.<sup>53</sup> Because Congress does not exclusively control the regulation of federal minerals located under federal surfaces, and BLM has stated that private surfaces are offered "the same level of protection provided [to] Federally owned surface,"<sup>54</sup> it follows that Congress does not occupy the entire regulatory field of federal minerals located under private surfaces.

For the WSOAA to be struck down on preemption grounds, it must actually conflict with federal laws or stand as an obstacle to the purposes of Congress. To determine whether state and federal regulations actually conflict, they are compared on their face and preemption occurs when "compliance with both . . . is a physical impossibility"<sup>55</sup> or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>56</sup> If either of these types of conflict occurs, then state law is preempted to the extent it conflicts with federal law.<sup>57</sup> A preemption claim will only be successful if no set of conditions exists where both laws can stand without conflict.<sup>58</sup>

50. 43 U.S.C. § 299(a).

51. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Hillsborough Cnty.*, 471 U.S. at 713.

52. *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303, 1304 (10th Cir. 1969); *Bd. of Cnty. Comm'rs*, 159 P.3d at 784 (discussing *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987)); *Gulf Oil*, 693 P.2d at 236.

53. *Gulf Oil*, 693 P.2d at 235.

54. BLM REPORT TO CONGRESS, *supra* note 6, at A-1, A-4.

55. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also Hillsborough Cnty.*, 471 U.S. at 713.

56. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Hillsborough Cnty.*, 471 U.S. at 713.

57. *Fla. Lime*, 373 U.S. at 142-43.

58. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987).



### III. Federal Purposes in Mineral Leasing

Before analyzing whether the WSOAA is operationally preempted, it is necessary to understand the several federal policies that guide mineral leasing and the objectives of leasing federal minerals.

#### A. Mineral Leasing Act

The purpose of the MLA is to promote the orderly development of oil and gas deposits through the use of private enterprise.<sup>59</sup> The United States has broad discretion to offer federal minerals for lease, as well as the power to control development through lease terms and stipulations.<sup>60</sup> Leases for federal minerals are issued under the MLA, regardless of whether the surface over the minerals is federal or private. As a component of leasing, the Secretary of the Interior shall “regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources.”<sup>61</sup> Since the plain language says this regulation applies to “any lease issued under this Act,” the Secretary should regulate surface-disturbing activities that take place on private surfaces in to the same extent it does for federal surfaces.

#### B. Federal Land Policy and Management Act

The passage of FLPMA in 1976 retained ‘public lands’ under BLM jurisdiction<sup>62</sup> and provided a broad mandate that applies to mining operations and several other activities: “In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to *prevent unnecessary or undue degradation* of the lands.”<sup>63</sup> Split estate lands are included in the term ‘public lands,’<sup>64</sup>

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59. *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967); *see also* *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1980).

60. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 620 (6th ed. 2007).

61. 30 U.S.C. § 226(g) (2006).

62. 43 U.S.C. § 1702(e) (2006) (“The term “public lands” means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership . . .”).

63. 43 U.S.C. § 1732(b) (2006) (emphasis added).

64. *Sierra Club v. Watt*, 608 F. Supp. 305, 335 (E.D. Cal. 1985) (The split estate in this case was federal surface over private mineral. The conclusion that the federal estate

therefore the federal mineral estate under private surface is managed according to the dictates of FLPMA.

Private surfaces are not managed according to FLPMA. But, BLM outlined in its EPACT report to Congress that one of BLM's responsibilities is to "offer[] the private surface owner the same level of protection provided on Federally owned surface[s]."<sup>65</sup> Therefore, in regulating federal minerals, BLM has assumed the responsibility of protecting private surface resources to the same degree it protects federal surface resources.

Federal surfaces are managed and protected in part through the Department of the Interior's development, maintenance, and revision of land use plans.<sup>66</sup> BLM regulations call these written land use plans Resource Management Plans ("RMP")<sup>67</sup> and they are prepared for mineral leases even when the only federal interest involved is the mineral estate.<sup>68</sup> To properly manage federal lands, RMPs are required to "consider present and potential uses of the public lands" and "weigh long-term benefits to the public against short-term benefits."<sup>69</sup> In addition to the standard considerations, when the only federal interest involved is the mineral estate, BLM regulations specifically provide that RMPs *must consider* the impact of mineral leasing on the "non-public land surface."<sup>70</sup> By taking private surface impacts into account, BLM's objective is to "maximize resource values for the public"<sup>71</sup> and manage land "in a manner that . . . provide[s] for . . . human occupancy and use."<sup>72</sup>

### C. Energy Policy Act of 2005

The EPACT was passed in 2005 to urgently develop "the technological capabilities to support the broadest range of energy policy options through conservation and use of domestic resources by socially and environmentally acceptable means."<sup>73</sup> The EPACT

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portion of the split estate is 'public land' should still apply when the minerals are federal and the surface private.).

65. BLM Report to Congress, *supra* note 6, at A-1, A-4.

66. 43 U.S.C. § 1712(a) (2006).

67. 43 C.F.R. § 1601.0-5(n) (2009).

68. *Id.* at § 1601.0-7(b).

69. 43 U.S.C. § 1712(c)(5), (7) (2006).

70. 43 C.F.R. § 1601.0-8 (2009).

71. *Id.* at § 1601.0-2.

72. 43 U.S.C. § 1701(a)(8) (2006).

73. 42 U.S.C. § 5902(a) (2006).

called for a streamlining of the environmental analyses necessary for mineral development, *but* when the Act is examined in its entirety, it calls for streamlining in a manner that addresses surface owner concerns and minimizes impacts.<sup>74</sup> To accomplish this, the EPACT called for BLM to consult with private surface owners, the oil and gas industry, and other interested parties to assess the effect of current policies and practices.<sup>75</sup> The Secretary was then required to report to Congress on the results of this comparison of rights and responsibilities<sup>76</sup> and to make recommendations of administrative or legislative actions that could be taken to continue to facilitate access to minerals “while addressing surface owner concerns and minimizing impacts to private surface.”<sup>77</sup>

*1. Impact on the National Environmental Policy Act and Changes After Audit*

In order to fast-track energy development, the EPACT established five rebuttable presumptions to categorically exclude certain oil and gas activities from analysis under the National Environmental Policy Act (“NEPA”).<sup>78</sup> Whenever a project meets the conditions of any of the five sections,<sup>79</sup> BLM can use a section 390 categorical exclusion (“390CE”) to bypass the preparation of new NEPA documents.<sup>80</sup> Section 390 therefore appeared to shift BLM’s

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74. See *infra* Part III.C.ii.

75. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1835(a), 119 Stat. 594, 721.

76. *Id.* at § 1835(a)(1).

77. *Id.* at § 1835(a)(3).

78. COGGINS, *supra* note 60, at 674.

79. “(1) Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed. (2) Drilling an oil or gas well at a location of well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well. (3) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well. (4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline. (5) Maintenance of a minor activity, other than any construction or major renovation or a building or facility.” NEPA Review, Pub. L. No. 109-58, § 390(b), 119 Stat. 594, 721 (2005); codified at 42 U.S.C. § 15942 (2006).

80. U. S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-872, ENERGY POLICY ACT OF 2005: GREATER CLARITY NEEDED TO ADDRESS CONCERNS WITH CATEGORICAL EXCLUSIONS FOR OIL AND GAS DEVELOPMENT UNDER SECTION 390 OF THE ACT, at 3, 9 (2009) [hereinafter GAO Report]. See also BLM H-1790-1 NATIONAL

priorities to emphasize resource extraction “at the expense of certain other agency missions, especially protecting its environmental resources.”<sup>81</sup>

But after the 390CEs were put into use, concerns were raised about BLM’s use of the exclusions and the U.S. Government Accountability Office (“GAO”) audited the program. The resulting GAO Report identified significant issues with the use of 390CEs such as a lack of definitive and clear guidance from BLM, little oversight of field offices, numerous violations of the law, and noncompliance with existing guidance.<sup>82</sup> The GAO Report recommended that Congress consider amending section 390 to clarify and resolve the identified issues.<sup>83</sup> Though it remains to be seen whether Congress will take action to amend or clarify section 390, BLM has reformed the EPACT-instituted procedures in order to better manage energy resources and to complete detailed environmental reviews in line with other federal requirements.<sup>84</sup>

## 2. *BLM’s Comparison of Rights and Responsibilities*

BLM’s Report to Congress regarding the effect of current policies found that surface owner’s concerns revolved around mineral development’s disturbance of their quality of life due to the increase in activity and the loss of land value—both economic and intangible.<sup>85</sup> BLM’s recommendation for action, instead of shifting any rights or responsibilities, focused on increased notification to surface owners during the planning process for leasing—primarily through the media and BLM’s website.<sup>86</sup>

By asking BLM to review current policies and make recommendations for the future, it seems incredibly off the mark that Congress expected the ‘new’ strategy to be essentially educating

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ENVIRONMENTAL POLICY ACT HANDBOOK, (2008), (which requires staff to “document their decisions and rationale for using any [390CE] to approve an oil or gas project.”); BLM INSTRUCTION MEMORANDUM NO. 2005-247 (September 30, 2005).

81. GAO Report, *supra* note 80, at 51.

82. *Id.* at 30, 50 (for instance, in eighty-five percent of sampled field offices, officials did not correctly follow BLM guidance, the most common failure was inadequate justification for the use of categorical exclusions).

83. *Id.* at 53.

84. Noelle Straub, *Interior Curbs Oil and Gas Lease Streamlining, Expands Reviews*, N.Y. TIMES (Jan. 6, 2010), <http://www.nytimes.com/gwire/2010/01/06/06greenwire-interior-curbs-oil-and-gas-lease-streamlining-59957.html>.

85. BLM Report to Congress, *supra* note 6, at 9.

86. *Id.* at 13–15.

surface owners of *existing* policies and practices.<sup>87</sup> While this may reduce conflicts as parties better understand what to expect in the mineral leasing process, it does little to actually address surface owner concerns or minimize any impacts to private surfaces.

#### IV. Operational Preemption Analysis

Wyoming has done what Congress appears to have expected BLM to do: address surface owner concerns while continuing to allow access to federal minerals. The remainder of this paper compares the state and federal statutes and regulations, and determines that because compliance with both laws is possible and the WSOAA does not frustrate federal purposes, the regulations do not operationally conflict.

Under the SRHA, the mineral developer may enter the surface to conduct mining operations in three alternative ways. First, he may enter upon securing written consent or waiver from the surface owner.<sup>88</sup> Second, he may enter upon the payment of an agreed-upon amount for damages to “crops or other tangible improvements.”<sup>89</sup> And third, in lieu of the success of the first or second alternatives, he may enter after posting a “good and sufficient bond” for the benefit of the surface owner.<sup>90</sup> All three of these options further the federal purpose of mineral leasing: develop oil and gas deposits<sup>91</sup> while minimizing impacts to the surface.<sup>92</sup>

The WSOAA requirements echo those of the SRHA. Under the WSOAA, the mineral developer must first comply with the provisions of the Act and reasonably accommodate existing surface uses before

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87. The BLM Report to Congress acknowledged that state surface owner protection statutes provide more protection than federal laws; that where both state and federal protections exist, surface owners prefer the state protections; and that split estate conflicts have recently moved to the forefront in Western states. Though the report took a neutral stance on preemption and did not address the applicability of these state laws to federal minerals. It did note that if parties are concerned about inconsistencies between state and federal laws, they could address the issue of damages in Surface Use Agreements. *Id.* at 25.

88. 43 U.S.C. § 299(a) (2006).

89. *Id.*

90. *Id.*

91. *Harvey v. Udall*, 384 F.2d 883 (10th Cir. 1967); *see also* *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839 (D. Wyo. 1980).

92. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1835(a)(3), 119 Stat. 594, 721 (2005).

entry is allowed.<sup>93</sup> There are two ways to do this. First, the developer can provide the required notice,<sup>94</sup> attempt good faith negotiations,<sup>95</sup> and obtain a valid consent, waiver, or surface use agreement that provides for the compensation of damages.<sup>96</sup> Or second, if parties reach an impasse in negotiations, the mineral developer may still access the mineral estate by executing a “good and sufficient surety bond” to secure payment for damages.<sup>97</sup>

#### **A. Entry through Notice, Good Faith Negotiations, and Consent or Waiver**

Federal regulations fill in the details of the SRHA regarding notice and good faith negotiations. Before actual mining operations begin, the mineral developer may enter the surface estate to conduct surveys or gather other needed information.<sup>98</sup> No specific notice is required for this entry, but the developer “should seek to reach agreement with the surface owner about the time and method by which any survey would be conducted.”<sup>99</sup> To commence operations, BLM guidance states the mineral operator must make a “good faith effort to notify the private surface owner before entry and make a good faith effort to obtain a Surface Access Agreement.”<sup>100</sup> The developer must certify to BLM these efforts were made and that either an agreement was reached or negotiations failed.<sup>101</sup> If

93. WYO. STAT. ANN. § 30-5-402(a) (2009).

94. Prior to initial entry to conduct nonsurface disturbing activities, operator shall provide at least five days of notice to surface owner. *Id.* at § 30-5-402(b) (any subsequent entry for nonsurface disturbing purposes does not require notice). Notice shall “sufficiently disclose the plan of work and operations to enable the surface owner to evaluate the effect of oil and gas operations on the surface owner’s use of the land.” *Id.* at § 30-5-402(e).

95. Good faith negotiations should be used to attempt to reach a surface use agreement for “the protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for damages caused by the oil and gas operations.” *Id.* at § 30-5-402(f). Either party has the right to request, and upon mutual agreement may use, dispute resolution processes. *Id.*

96. *Id.* at § 30-5-402(c)(i), (ii).

97. *Id.* at § 30-5-402(c)(iv).

98. Onshore Oil & Gas Order No. 1, 72 Fed. Reg. 10,328, 10,336 (Mar. 7, 2007) (to be codified at 43 C.F.R. § 3160) [hereinafter Onshore Oil & Gas Order].

99. *Id.*

100. *Id.* Any consent of waiver must come from the entryman or patentee. 43 C.F.R. § 3814.1(c) (2009); *see also* Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 543 (Wyo. 1988) (holder of an easement not protected).

101. Onshore Oil & Gas Order, *supra* note 98.

negotiations fail, entry may still be acquired by posting bond.<sup>102</sup> Recognizing that states may have more detailed or different regulations, general performance standards require that the mineral developer's notice and plan of operations also be conducted "in a manner that complies with all pertinent Federal and state laws."<sup>103</sup>

The WSOAA requires notice be given to the surface owner before initial entry and before operations commence. The first entry of the surface requires notice of at least five days.<sup>104</sup> For any subsequent entries to conduct non-surface disturbing activities, the WSOAA only says that the "operator shall provide notice."<sup>105</sup> For the actual commencement of mineral operations, notice of a work plan must be given to the surface owner no more than 180 days before development begins, but no less than 30 days.<sup>106</sup> Once this notice is provided, the mineral developer must attempt good faith negotiations with the surface owner for "the protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for damages caused by the oil and gas operations."<sup>107</sup> As with the SRHA, if negotiations fail, entry may still be accomplished under another provision by posting sufficient bond.<sup>108</sup>

### *1. Compliance with Both as a Physical Impossibility*

Comparing the two sets of regulations, the federal regulations offer vague guidelines, whereas the WSOAA provides defined notice periods. But, the state regulations do not require any action that makes it impossible to also satisfy federal regulations. Nor do the federal regulations require anything that makes it impossible for the mineral developer to comply with the WSOAA. For instance, when the developer provides a work plan to the surface owner as required by the WSOAA and undertakes good faith negotiations to protect surface resources and pay for damages, the federal good faith effort to reach a Surface Access Agreement is also satisfied. The WSOAA does not have different requirements for the plan of operations, but if

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102. See *infra* Part IV.C.

103. 43 C.F.R. § 3809.420(a)(6) (2009).

104. WYO. STAT. ANN. § 30-5-402(b) (2009).

105. *Id.* ("nonsurface" activities include "inspections, staking, surveys, measurements and general evaluation of proposed routes and sites for oil and gas operations.").

106. *Id.* at § 30-5-402(d), (e).

107. *Id.* at § 30-5-402(f).

108. See *infra* Part IV.C.

it did, the federal mineral developer would need to comply with both as directed by federal regulations.<sup>109</sup> Therefore, the WSOAA notice and negotiation provision cannot be preempted on the ground that it is physically impossible to comply with both state and federal requirements.

## 2. *Frustration of Federal Purposes*

Regarding whether the more detailed WSOAA notice and negotiation provisions frustrate congressional intent, the WSOAA does not substitute state judgment for that of the federal government in any way that prohibits mineral development. Requiring notice before extraction is very different from requiring surface owner consent to move forward.<sup>110</sup> If the WSOAA instituted surface owner protections so stringent that the surface owner or state could block development—that would be an impermissible state veto on federal action.<sup>111</sup> Should that be the situation, preemption would be clearly authorized.<sup>112</sup> But under the WSOAA, so long as notice is given to the surface owner and negotiations are at least attempted in good faith, the state cannot bar the developer from entry. It is important to note that federal regulations also require both notice and good faith negotiations, so this WSOAA provision does not require additional steps. The requirements are just more explicit than in the federal regulations. Not only is negotiating with the surface owner in line with federal regulations, it also embodies the congressional purposes in the EPACT to address surface owner concerns and minimize surface impacts.<sup>113</sup>

Also, the WSOAA does not allow any of the required negotiations to stop development of federal minerals and hence does not frustrate federal leasing purposes. So long as the operator gives notice and attempts negotiations, if reaching an agreement fails, the posting of bond allows development to proceed, even if development is against the surface owner's wishes.<sup>114</sup> Because state requirements do not frustrate the federal objective to lease and develop minerals,

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109. 43 C.F.R. § 3809.420(a)(6) (2009).

110. *See* *Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 556 n.5 (8th Cir. 1984).

111. *See* *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987).

112. *Id.*

113. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1835(a)(3), 119 Stat. 594, 1140 (2005).

114. WYO. STAT. ANN. § 30-5-402(c)(iv) (2009); *see also infra* Part IV.C.



Wyoming is able to enforce the WSOAA on private surfaces overlaying federal mineral estates.<sup>115</sup>

### **B. Entry Through Payment for Damages**

Under the SRHA, if the mineral developer is unable to secure a written consent or waiver from the surface owner, he may still enter the surface by reaching an agreement on the amount of damages to be payable for harm to crops, tangible improvements, and the value of the land for grazing.<sup>116</sup>

Under the WSOAA, if entry and development proceed under the option of notice, good faith negotiations, and a surface use agreement, the agreement must provide for the compensation of damages to the surface.<sup>117</sup> Damages compensable under the WSOAA go beyond those authorized in the SRHA to include “loss of production and income, loss of land value, and loss of value to improvements caused by oil and gas operations.”<sup>118</sup> But, should a mineral developer be unwilling to pay damages in surplus to those covered by the SRHA, the WSOAA cannot stop development on this basis. As discussed briefly and as will be discussed in more depth shortly, entry can still be undertaken if the developer posts a bond.<sup>119</sup>

#### *1. Compliance with Both as a Physical Impossibility*

It is not impossible to satisfy both damage requirements because paying for the SRHA mandated damages does not preclude the ability of the developer to also compensate for the WSOAA damages—a higher bond will just be needed. The more pertinent issue in this conflict consideration is whether the WSOAA’s enlargement of allowable damages frustrates the federal purposes of mineral development or infringes on the federal authority limit damages.

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115. See *Granite Rock*, 480 U.S. at 580; see also *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

116. 43 U.S.C. § 299(a) (2006); 30 U.S.C. § 54 (2006).

117. WYO. STAT. ANN. § 30-5-402(c)(i), (ii).

118. *Id.* § 30-5-405(a)(i). The amount and method of compensation can be determined in any manner mutually agreeable to both estates, and consideration should be given to the amount of time during which the loss occurs. *Id.* § 30-5-405(a)(ii).

119. See *infra* Part IV.C.

## 2. *Frustration of Federal Purposes*

The purpose of the MLA is to promote the orderly development of oil and gas deposits in public lands;<sup>120</sup> however, FLPMA and the EPACT encompass additional and more recent federal considerations of surface uses and the environmental impacts of mining. When looking to all congressional intentions, the overall federal purpose is to allow access to federal minerals in a manner that permits both parties to use their property to the highest degree possible, in a manner not inconsistent with the rights of the other.<sup>121</sup> Allowing the surface owner to stop access to minerals or to unilaterally put conditions in place would clearly frustrate federal objectives because it dictates the federal government's access to its own property. Such a situation would also be contrary to Congress' power to "make all needful Rules and Regulations respecting . . . Property belonging to the United States."<sup>122</sup> But, if mineral development is incompatible with the rights of the surface owner, since the surface owner cannot stop or condition development, he should at least be compensated for damages that affect the surface estate's value and future use.

The WSOAA damage provision does this by giving surface owners the power to negotiate all damages to their land while also allowing the development of federal minerals to continue unobstructed by any unwillingness on the part of the surface owner.<sup>123</sup> The WSOAA damages do not give the surface owner or the state the power to veto Congress' desire to develop federal minerals. If negotiations between parties are successful and development proceeds under that alternative, then the WSOAA broadens the damages that the surface owner can be compensated for. But if the mineral developer objects and does not wish to pay these additional damages, so long as negotiations have been attempted in good faith, extraction is still able to proceed through the posting of a bond.<sup>124</sup>

120. *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967); *see also* *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981).

121. *See* *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976); *see also* *Mergen*, *supra* note 17, at 435–36.

122. U.S. CONST. art. IV, § 3, cl. 2.

123. This is in line with *Gulf Oil's* rule that states cannot prohibit federally approved uses either temporarily or permanently in an attempt to substitute state judgment for that of the federal government. *Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979).

124. *See infra* Part IV.C.

### 3. *Intrusion into Federal Authority*

Turning to whether this WSOAA damage provision intrudes into the sphere of federal authority to limit compensation, Congress has general power over mineral leasing, but has left space for states to add rules and regulations.<sup>125</sup> This indicates that Congress did not intend federal regulations in this field to be an upper limit, but rather that states be able to supplement so long as state regulations do not conflict with federal laws.<sup>126</sup> The WSOAA regulations are similar to those in *California Coastal Commission v. Granite Rock* in that they “seek[] to regulate a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion.”<sup>127</sup> But, unlike the preempted *Granite Rock* regulations that required state approval of development plans and adherence to certain state requirements before proceeding, the WSOAA does not stop developers from extracting minerals nor does it prohibit damage to the surface. Developers are free to proceed, but they will need to pay for any resulting damages that affect the surface estate’s production and income value, land value, or value of improvements. The WSOAA damage provisions do not intrude into the sphere of federal authority or frustrate federal purposes; therefore this provision is not operationally preempted.

The WSOAA supplements the minimums provided for by Congress in a way that does not intrude on federal authority because it allows development to proceed and federal purposes to be fulfilled. Not only do the WSOAA damage provisions maintain the development of federal minerals, the purpose of the broader damages is to advance the “public health, safety, peace, and welfare,” of the surface owner.<sup>128</sup> Collectively, since almost half of all privately owned land in Wyoming is located on top of federal minerals, these regulations do not only benefit individual surface owners—they protect huge swaths of land across Wyoming. The damage provision therefore also falls under the plenary authority of Wyoming’s police power.<sup>129</sup> The proper exercise of this power is not unlimited as it is

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125. See *Gulf Oil*, 601 F.2d at 1086; see also *Tex. Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 371 (W.D. Okla. 1967).

126. *Gulf Oil*, 601 F.2d at 1086.

127. *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

128. See Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 861 (2000).

129. See *id.*

subject to the supervision of the courts, but the *Village of Euclid v. Ambler Realty Co.* test will only find exercises of police power unconstitutional if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>130</sup>

Mineral developers could attempt to argue that the additional WSOAA damages are arbitrary and unreasonable and therefore constitute a taking, but this claim would fail.<sup>131</sup> The *Murphy v. Amoco* court held that requiring the mineral developer to compensate the surface owner for damages does not take private property for public use without just compensation.<sup>132</sup> This is because even amidst broader damage requirements, the mineral owner still has the same property rights as before and remains free to develop the minerals as previously planned—paying damages does not defeat the ability of the developer to realize the value of the mineral estate.<sup>133</sup> Even if the right to damage the surface estate were characterized as part of the ‘property right’ of the mineral estate, restrictions on that right would not amount to a compensable taking because it affects just one strand in the bundle.<sup>134</sup> Since the WSOAA would be examined in its entirety, state modification of this one strand would not amount to an uncompensated taking.<sup>135</sup>

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130. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *see also* *Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 555 (8th Cir. 1984).

131. Alternatively, discussing substantive due process allegations in this type of case, the Court in *Lingle v. Chevron* held that whether a regulation substantially advances a legitimate governmental goal is not an appropriate method for identifying violations of substantive due process because the inquiry looks only to due process concerns and does not discern whether private property has been taken for the purposes of the Fifth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

132. *Murphy*, 729 F.2d at 558.

133. *Id.* The WSOAA and its effects are distinguishable from *Pennsylvania Coal v. Mahon* because in that case part of the mineral developer’s property right was permanently transferred by statute to the surface owner without just compensation and against a valid contract that defined the property rights otherwise. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). Whereas here, the mineral developer still retains the same property rights of entry and extraction. The WSOAA does not permanently transfer a right to the surface owner to be compensated for certain damages, it just opens up the field of negotiations.

134. *See Murphy*, 729 F.2d at 558.

135. *See id.*

### C. Entry Through Bond Procedures

The “bond-on” process is available under the SRHA and federal regulations as an alternative route to begin development if other options fail.<sup>136</sup> In practice, the “bonding-on” option is not frequently used because mineral lessees often give consent or enter into voluntary surface damage agreements.<sup>137</sup> To acquire entry to the surface, the mineral developer must post a “3814” bond for the use and benefit of the surface owner for damages “to the crops or tangible improvements.”<sup>138</sup> The bond must not be less than \$1,000.00 and BLM has the authority to require additional bonding if necessary.<sup>139</sup> In addition, before operations commence, a second “3104” reclamation bond is necessary.<sup>140</sup> This bond shall not be less than the minimum amount required to ensure “complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations.”<sup>141</sup> Even if the surface owner still objects, so long as the procedural requirements are in order, BLM may approve the bonds and permit development.<sup>142</sup>

Under the WSOAA, if good faith negotiations stall, operations may similarly go forward upon the execution of good and sufficient bond.<sup>143</sup> As with the WSOAA damages compensable under the surface use agreement, the WSOAA bond covers damages broader than those provided for in the SRHA: “loss of production and income, loss of land value and loss of value of improvements caused by oil and gas operations.”<sup>144</sup> The bond for entry shall not be less than \$2,000.00 per well site on the land.<sup>145</sup> A reclamation bond is also required to secure the “performance of the duty to plug each dry or

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136. 43 U.S.C. § 299(a) (2006); 43 C.F.R. § 3814.1(c) (2009); *see also* Drake D. Hill & P. Jaye Rippley, *The Split Estate: Communication and Education Versus Legislation*, 4 WYO. L. REV. 585, 599 (2004).

137. Hill & Rippley, *supra* note 136, at 599.

138. 43 C.F.R. § 3814.1(c).

139. *Id.*; *see also* Hill & Rippley, *supra* note 136, at 600.

140. 43 C.F.R. § 3104.1(a) (2009).

141. *Id.*

142. *Id.* § 3814.1(d); *see also* Hill & Rippley, *supra* note 136, at 600.

143. WYO. STAT. ANN. § 30-5-402(c)(iv) (2009).

144. *Id.* § 30-5-405(a)(i).

145. *Id.* § 30-5-404(b).

abandoned well or the repair of wells causing waste and compliance with the rules and orders of the commission.”<sup>146</sup>

### 1. *Compliance with Both as a Physical Impossibility*

The existence of state bonding requirements does not make it impossible to also satisfy federal bond obligations—a larger sum will just need to be provided by the developer to satisfy both bonds. The complication is that a situation could arise wherein an operator has paid the federal entry bond, but is denied entry until the state bond has been paid. This would create an impermissible temporary state veto.<sup>147</sup> But, it is enough to defeat a facial challenge to the WSOAA if a set of circumstances exists where the state requirements can be applied without preemption.<sup>148</sup> Such a situation is possible if the state bonds are secured prior to the completed approval of the posted federal bonds.<sup>149</sup> In that case, state bond requirements would not block federally authorized entry or extraction as development could commence as soon as federal bonding requirements were fulfilled.

### 2. *Frustration of Federal Purposes*

Federal bonding regulations may be extensive, but like the MLA they do not contain the congressional intent to assert exclusive control.<sup>150</sup> Federal regulations call for bonds to cover damages to crops and other improvements, and say that BLM has authority to require additional bonding if necessary.<sup>151</sup> Without the intent to assert exclusive control, the federal bonding amounts are more appropriately viewed as a regulatory floor for states to supplement than as a ceiling. BLM's authority to increase bond amounts also indicates that federal requirements are not a maximum. In addition, recent congressional calls that mineral development “address[] surface owner concerns and minimiz[e] impacts to private

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146. *Id.* § 30-5-104(d)(i)(D).

147. *See* *Ventura Cnty. v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979).

148. *See* *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 589 (1987); *see also* John D. Leshy, *Granite Rock and the States' Influence over Federal Land Use*, 18 ENVTL. L. 99, 100 (1987).

149. Such a permissible application would not exist if the WSOAA, for instance, required entry or drilling to begin within ten days after bonds were posted. But the WSOAA does not have any requirements that would have such an effect.

150. *See, e.g.,* *Tex. Oil & Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303, 1304–06 (10th Cir. 1969); *Bd. of Cnty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773, 785 (Colo. App. 2006) (discussing *Granite Rock*, 480 U.S. at 572).

151. 43 C.F.R. § 3814.1(c) (2009); *see also* Hill & Rippley, *supra* note 136, at 599.

surface[s]”<sup>152</sup> illustrates a federal concern with surface damages beyond just crops and improvements. The broader WSOAA bonds do not stand as an obstacle to the accomplishment of federal goals, but rather they exemplify the most recent expressions of federal purpose—to address surface owner concerns and minimize impacts.<sup>153</sup> Because state entry and reclamation bonds can be applied without frustrating federal regulations, preemption of the WSOAA is not authorized by the Supremacy Clause.<sup>154</sup>

### Conclusion

The mineral industry is beginning to lose its once “preeminent place among federal land uses”<sup>155</sup> and it is now becoming “one use among many and deserv[ing] [of] no more deference than any other.”<sup>156</sup> Due in part to this shift, and prompted by aggressive domestic energy policies and advancements in mining techniques, federal and state legislators have taken appropriate action to protect the environment and surface owners of lands overlaying federal minerals.<sup>157</sup> Beginning with early adjustments to federal statutes and up through recent program audits and recommendations, Congress has illustrated a consistent intent that surface uses be considered as federal minerals are developed.<sup>158</sup>

The extraction of oil and gas is essential to Wyoming and the United States. But, the goal of Congress to facilitate access to minerals is qualified by the need to address surface owner concerns and to minimize impacts to the surface estate.<sup>159</sup> At first glance, this tension between mineral developers and surface owners is a dispute over property rights that were plainly apportioned long ago in the homestead era. But, this ignores the fact that for many surface owners, the viability of their land depends upon its environmental

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152. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1835(a)(3), 119 Stat. 594, 1140 (2005).

153. See *infra* Part III.C.ii.

154. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

155. Leshy, *supra* note 148, at 126.

156. *Id.*

157. *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 546 (Wyo. 1988).

158. See, e.g., *id.* at 546–47.

159. See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1835(a)(3), 119 Stat. 594, 1140 (2005).

health.<sup>160</sup> Mineral development in the West is essential, but oil and gas should be developed responsibly, keeping in mind that the integrity of surface values are as important to the people of the state as oil and gas are to the nation.<sup>161</sup>

The WSOAA appropriately considers all of these factors and encourages mineral development by socially and environmentally acceptable means. The WSOAA creates a more sustainable system that “protect[s] traditional land uses . . . , account[s] for the interest of future generations, and internalize[s] costs to the producer.”<sup>162</sup> Under this state law, federal minerals can continue to be developed while certain mechanisms protect the interests of surface owners. Because the WSOAA does not make compliance with federal laws impossible nor does it stand as an obstacle to Congress’ objectives, the WSOAA is not preempted by federal law.

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160. Keith G. Bauerle, *Reaping the Whirlwind: Federal Oil and Gas Development on Private Lands in the Rocky Mountain West*, 83 DENV. U. L. REV. 1083, 1086 (2006).

161. J. Benjamin Winburn, Comment, *The Coalbed Methane Boom: The Push for Energy Independence Raises Questions About Water and the Rights of America's Homesteaders*, 19 TUL. ENVTL. L.J. 359, 381 (2006).

162. James Murphy, *Slowing the Onslaught and Forecasting Hope for Change: Litigation Efforts Concerning the Environmental Impacts of Coalbed Methane Development in the Powder River Basin*, 24 PACE ENVTL. L. REV. 399, 436 (2007); see also Gary Bryner, *Coalbed Methane Development in the Intermountain West*, NATURAL RES. CTR., UNIV. OF COLO. SCH. OF LAW, 36–37 (July 2002), [http://www.colorado.edu/law/centers/nrlc/publications/CBM\\_Primer.pdf](http://www.colorado.edu/law/centers/nrlc/publications/CBM_Primer.pdf).



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